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BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION RECEIVED**

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OCT - 6 1997

In re Applications of	)	MM Docket No. 97-128
	)	
Martin W. Hoffman, Trustee-in-Bankruptcy	)	File No. BRCT-881201LG
For Renewal of License, and	)	
	)	
Shurberg Broadcasting of Hartford	)	File No. BPCT-831202KF
For Construction Permit	)	

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

TO: The Commission

**COMMENTS OF TWO IF BY SEA BROADCASTING CORPORATION  
IN SUPPORT OF "MOTION FOR WAIVER AND APPLICATION FOR REVIEW"**

Two If By Sea Broadcasting Corporation ("TIBS") respectfully submits that the "Motion For Waiver and Application For Review" filed by Richard P. Ramirez on September 25, 1997, and the stay of hearings requested therein, should be immediately granted for the following reasons:

**FCC Compliance with Court Order.** On January 10, 1997, Shurberg Broadcasting of Hartford ("SBH") filed an Emergency Petition To Recall Mandate ("Recall Petition") in which it asked the U.S. Court of Appeals, D. C. Circuit, to cancel the license held by Martin W. Hoffman, Trustee-In-Bankruptcy, based on alleged misconduct by Astroline Communications Company Limited Partnership ("ACCLP"). On February 10, 1997, SBH filed a Supplement to its Recall Petition. TIBS' counsel then learned that the alleged misconduct had already been the subject of a thorough trial and decision by the U.S. Bankruptcy Court, which fully exonerated ACCLP. On February 20, 1997, TIBS opposed SBH's Supplement and showed the Court that SBH's Recall Petition had concealed the highly relevant decision in the parallel Bankruptcy proceeding. Opp. at 2-6. TIBS stressed that SBH's charge of fraud "requires a finding of fraudulent intent" and that:

"Given the Bankruptcy Court's reasonable conclusion that Ramirez in fact retained control, the principals of Astroline certainly proceeded reasonably and without fraudulent intent in believing that their arrangement was proper." Opp. at 5-6.

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TIBS also stressed that SBH's allegations first required FCC consideration and that:

"The fact that those allegations have been judicially rejected after a full scale evidentiary hearing, which SBH did not disclose, could well influence the FCC's evaluation of SBH's claim.... These too are matters that warrant consideration by the agency in the first instance." Opp. at 8-9.

Just a week after TIBS' Opposition, the Court denied SBH's Recall Petition and declared, "The allegations of fraud should be addressed, in the first instance, by the Federal Communications Commission." Ex. 1. While the Court thus agreed with TIBS' Opposition, the Commission did not consider either the parallel Bankruptcy Court decision or the pivotal issue of intent when it issued its HDO. FCC 97-128 (4/28/97). Those omissions place the Commission in non-compliance with the Court's Order. Ramirez' motion and the requested stay should be granted to permit the Commission to deliberate and decide those matters to come into compliance with the Court Order.<sup>1</sup>

**Relevance Of Unconsidered Facts.** Such consideration is especially required because the matters that the Court expected the Commission to consider were highly relevant to the HDO. It is settled that "evidence demonstrating an 'intent to deceive'... traditionally has been the *sine qua non* of a misrepresentation issue." Riverside Broadcasting Company, Inc., 104 FCC 2d 644, 648 (¶8) (1986) (issue not designated absent "critical" evidence of intent to deceive); Armando Garcia, 3 FCC Rcd 1065, 1067 (¶15) (Rev. Bd. 1988) ("it is well-established that an intent to deceive must be demonstrated to support a misrepresentation issue"). Here, the HDO designated a misrepresentation issue without addressing the crucial issue of intent. Yet, as previously shown, the Bankruptcy Court decision and evidence, which verified Ramirez' control of ACCLP and Arthur

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<sup>1</sup>TIBS notes that the Commission's omissions resulted from intentional and egregious deceit by SBH, the details of which are before the agency in the Petition To Dismiss Application of SBH, filed 8/14/97, pp. 34-59, and Petitioners' Reply to Opposition, filed 10/1/97, pp. 26-29.

Andersen's affirmation of his greater than 20% ownership, dispositively established that ACCLP acted in good faith and without intent to deceive. Ramirez' motion and the requested stay should be granted so the Commission can address the pivotal but never considered pre-designation question of intent.<sup>2</sup>

The Bankruptcy Court decision was also critical to making an informed and reasoned decision whether SBH's allegations required denial of relief under the Second Thursday policy. The HDO designated the issue after concluding, "on balance," that "the severity of the misconduct *alleged*" outweighed the "duty to minimize conflict with policies arising from the bankruptcy statutes." HDO at ¶11. That balancing, however, would have been completely different if the scale had weighed the fact that SBH's "allegations" had already been disproved by a Court decision based on overwhelming evidence establishing that Ramirez indeed controlled ACCLP and a Big Six accounting firm affirmed his belief as to his ownership percentage. In that case, SBH's allegations could not conceivably have outweighed the established public interest behind the Second Thursday policy.<sup>3</sup>

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<sup>2</sup>The distress sale policy was intended to enable minorities to operate their own stations by obtaining financing from investors. Here, the Bankruptcy Court decision establishes that Ramirez did fully operate his own station by obtaining financing from the limited partners that became necessary when SBH's litigation dissuaded conventional sources from participating. It is a perversity of justice that such a proved fulfillment of the Commission's objectives would result in a designation for hearing without any consideration of the overwhelming evidence of ACCLP's innocent intent.

<sup>3</sup>To reach such a ruling, one would have to conclude that allegations which already had been *disproved* in court carry more weight than judicial determinations of *actual guilt* or dispositive proof of *actual misconduct*. See, e.g., the following cases where the Second Thursday policy applied: Newsouth Broadcasting, Inc., 8 FCC Rcd 1272 (1993) (laundering drug money); KOZN FM Stereo 99, 6 FCC Rcd 257 (1991), 5 FCC Rcd 2849 (1990) (misrepresenting United States citizenship); Pyle Communications of Beaumont, Inc., 4 FCC Rcd 8625 (1989) (racial discrimination in employment practices); KOLA, Inc., 11 FCC Rcd 14297 (1996) (four felonies including murder). Such a ruling would be irrational and arbitrary.

In this respect, Ramirez is correct that the HDO conflicts with the action taken a few weeks later in MobileMedia Corp. FCC 97-197 (6/6/97), and violates Melody Music, Inc. v. FCC, 345 F. 2d 730 (D.C. Cir. 1965). In MobileMedia, on one hand, it was *undisputed* that the licensee made *hundreds* of misrepresentations, constituting a “magnitude of false filings” that was “unprecedented.” *Id.* at ¶17. Here, on the other hand, there were only *allegations* of a much smaller number of misrepresentations, the bases for which had already been *disproved* in a Court decision. Conducting the same balancing test it did here, the Commission held in MobileMedia (¶13) that the “danger of severe harm to a multitude of innocent creditors” outweighed the unprecedented severity of the misconduct and that the Second Thursday policy applied to the licensee’s undisputed deceit, and stayed the proceeding to enable the licensee to make a showing under that policy. Had the Commission weighed the Bankruptcy Court decision refuting SBH’s allegations of intentional misconduct when it balanced the applicability of the Second Thursday policy here, it would have been inconsistent and purely arbitrary for it to have ruled differently than it did in MobileMedia. Ramirez’ motion also should be granted so the Commission can consider the applicability of the Second Thursday policy based on all the relevant factors.<sup>4</sup>

Moreover, by failing to consider whether, in light of the exonerating Bankruptcy Court decision, a *substantial* and *material* question of fact really existed at all, the HDO reached a ruling

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<sup>4</sup>Indeed, the very process of balancing misconduct performed in the HDO is arbitrary and capricious. As noted above, the Commission has consistently granted relief under the Second Thursday policy to perpetrators of grave and disqualifying offenses. Once conduct crosses the threshold to be defined as disqualifying, injuring innocent creditors through attempts to grade the degree of such conduct is an entirely subjective, arbitrary, and inappropriate exercise. *See* Petition To Dismiss SBH’s application, pp. 56-58.

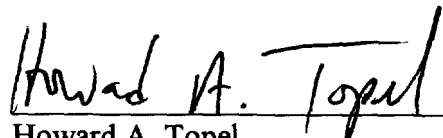
that is essentially uninformed. Ramirez' motion and requested stay should be granted to enable the Commission to consider this matter too.

**Change in Status Since HDO.** Grant of Ramirez' motion is also warranted because the status of this proceeding has changed dramatically since the HDO was issued. At that time the Commission thought that SBH's application could be promptly *granted*. HDO, ¶13. The HDO was geared to facilitate a final resolution of the Channel 18 proceeding in light of that belief. However, as the Petition To Dismiss SBH's application and the Petitioners' Reply to SBH's Opposition demonstrate, SBH's application should be promptly *dismissed* and *cannot* be granted without hearings on numerous issues. In the current context, *dismissal* of SBH's application, coupled with *grant* of Ramirez' motion, will best facilitate a prompt and final resolution. It is manifest in light of the Bankruptcy Court decision that the ACCLP issues should not have been designated and cannot preclude grant of the Trustee's renewal application, whether that conclusion is reached under the Second Thursday policy, for the lack of evidence of intent to deceive, or for any or all of the reasons cited. Thus, grant of Ramirez' petition and dismissal of SBH's application, as are fully warranted, will facilitate the Commission's reaching a prompt and final disposition of this case.

Respectfully submitted,  
**TWO IF BY SEA**  
**BROADCASTING CORPORATION**

Fleischman and Walsh, L.L.P.  
1400 Sixteenth Street, N.W.  
Washington, D.C. 20036  
(202) 939-7900

By:



Howard A. Topel  
Joshua W. Resnik

Its Counsel

October 6, 1997

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 84-1600**

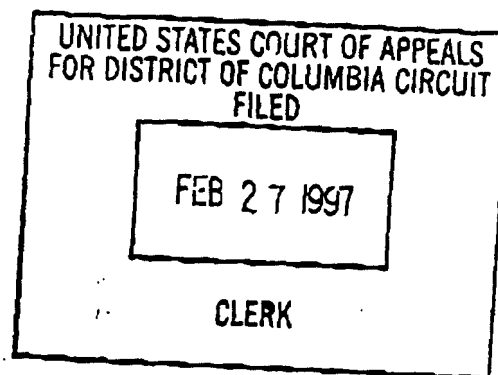
**September Term, 1996**

Shurberg Broadcasting of Hartford,  
Appellant

v.

Federal Communications Commission,  
Appellee

Astroline Communications Company,  
Intervenor



**BEFORE:** Ginsburg, Sentelle, and Henderson, Circuit Judges

**ORDER**

Upon consideration of the emergency petition to recall mandate, the opposition thereto and the reply; the motions for leave to intervene and the opposition thereto; and the supplement to the petition to recall the mandate and oppositions thereto, it is

**ORDERED** that the motions for leave to intervene be denied. It is

**FURTHER ORDERED** that the emergency petition to recall the mandate, and the supplement thereto, be denied. The allegations of fraud should be addressed, in the first instance, by the Federal Communications Commission.

**Per Curiam**

*[Handwritten signature]*  
K L H

## **CERTIFICATE OF SERVICE**

I, Howard A. Topel, hereby certify that on this 6th day of October, 1997, copies of the foregoing "Comments of Two If By Sea Broadcasting Corporation in Support of 'Motion for Waiver and Application for Review'" were sent by first class mail, postage prepaid, to the following:

- \* John I. Riffer, Esq.  
Office of General Counsel  
Federal Communications Commission  
1919 M Street, N.W.--Room 610  
Washington, D.C. 20554
  
- \* William E. Kennard, Esq.  
Office of General Counsel  
Federal Communications Commission  
1919 M Street, N.W.--Room 614  
Washington, D.C. 20554
  
- \* Honorable John M. Frysiak  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W.--Room 223  
Washington, D.C. 20554
  
- \* Daniel M. Armstrong, General Counsel  
Federal Communications Commission  
1919 M Street, N.W.--Room 602  
Washington, D.C. 20554

---

\* Hand Delivered.

- \* Roy J. Stewart, Chief  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W.--Room 314  
Washington, D.C. 20554
  
- \* Barbara A. Kreisman, Chief  
Video Services Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W.—Room 702  
Washington, D.C. 20554
  
- \* James J. Brown, Assistant Chief  
Video Services Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W.--Room 702  
Washington, D.C. 20554
  
- \* Clay Pendarvis, Chief  
Television Branch, Video Services Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W.--Room 702  
Washington, D.C. 20554
  
- \* Norman Goldstein, Esq.  
Chief, Complaints/Political Programming Branch  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W.--Room 8210  
Washington, D.C. 20554

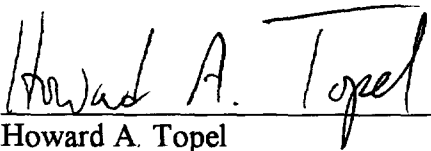


\* James Shook, Esq.  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W.--Room 8202-F  
Washington, D.C. 20554

Harry F. Cole, Esq.  
Bechtel & Cole, Chartered  
1901 L Street, N.W.--Suite 250  
Washington, D.C. 20036

Kathryn R. Schmeltzer, Esq.  
Fisher, Wayland, Cooper, Leader & Zaragoza, L.L.P.  
2001 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, D.C. 20006-1851

Peter D. O'Connell, Esq.  
Reed Smith Shaw & McClay  
1301 K Street, N.W.  
East Tower--Suite 1100  
Washington, D.C. 20005-3317

  
Howard A. Topel